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4 JIN LIU,
5 Plaintiff,
6 v.
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8 CAROLYN W. COLVIN,
9 Defendant.
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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 Case No. [16-cv-01553-MEJ](#)

16 **ORDER RE: CROSS-MOTIONS FOR
SUMMARY JUDGMENT;
REMANDING ACTION FOR FURTHER
PROCEEDINGS**

17 Re: Dkt. Nos. 14, 21
18
19

20 **INTRODUCTION**

21 Plaintiff Jin Liu (“Plaintiff”) brings this action pursuant to 42 U.S.C. § 405(g), seeking
22 judicial review of a final decision of Defendant Carolyn W. Colvin (“Defendant”), Acting
23 Commissioner of Social Security, denying Plaintiff’s claim for disability benefits. Pending before
24 the Court are the parties’ cross-motions for summary judgment. Dkt. Nos. 14 (Pl.’s Mot.), 21
25 (Def.’s Mot.). Pursuant to Civil Local Rule 16-5, the motions have been submitted on the papers
26 without oral argument. Having carefully reviewed the parties’ positions, the Administrative
Record (“AR”), and relevant legal authority, the Court hereby **GRANTS IN PART** Plaintiff’s
Motion and **GRANTS IN PART** Defendant’s Cross-Motion for the reasons set forth below.

27 **SOCIAL SECURITY ADMINISTRATION PROCEEDINGS**

28 On March 21, 2013, Plaintiff filed a claim for Disability Insurance Benefits, alleging
disability beginning on February 8, 2011. AR 157-58. Plaintiff contended he was disabled due to
Post Traumatic Stress Disorder (“PTSD”), depression, chronic pain, and back injuries, including
lumbar disc disease. AR 70.

Administrative Law Judge (“ALJ”) Maxine Benmour conducted a hearing on December
11, 2013 (AR 26-69), and issued a decision denying Plaintiff’s application on December 27, 2013.

1 AR 9-20. Plaintiff sought judicial review of this action before the Honorable Phyllis J. Hamilton.
2 AR 838-39; *see Liu v. Colvin*, 14-cv-01937-PJH (N.D. Cal.). He filed a motion for summary
3 judgment challenging the ALJ's decision, and the parties stipulated to remanding the action for
4 further administrative proceedings. AR 840-42. Judge Hamilton remanded the action on January
5 30, 2015, with directions for the ALJ to provide Plaintiff with the opportunity for a hearing and to
6 issue a new decision. AR 844-46. Specifically, the court instructed the ALJ to (1) further
7 consider Plaintiff's medically determinable impairments at Steps Two and Three; (2) give further
8 consideration to the treating and non-treating medical opinions of record and state the weight
9 accorded to each along with the supporting rationale; (3) consider third party statements; (4)
10 reconsider Plaintiff's residual functional capacity, determine whether he can perform his past
11 relevant work, and if necessary, obtain assistance of a vocational expert to determine whether
12 Plaintiff can perform jobs that exist in significant numbers in the national economy. *Id.*

13 The ALJ held a supplemental hearing on September 3, 2015. AR 768-809. Plaintiff and a
14 vocational expert testified at the supplemental hearing. AR 770-809. On December 29, 2015, the
15 ALJ once more denied Plaintiff's claim. AR 688-707. Plaintiff now appeals the denial of
16 benefits. This Order reviews the ALJ's December 19, 2015 decision.

17 EVIDENCE

18 Plaintiff is a U.S. Army veteran. He spent several years on active duty, and served in the
19 Reserves from 1997 until his discharge in 2011. The AR includes extensive documentation from
20 the U.S. Department of Veterans Affairs ("VA"), including medical records and records from the
21 proceedings in which the VA found Plaintiff was partially disabled as a result of service-connected
22 physical disability. The AR in this matter is voluminous, and the undersigned only identifies the
23 evidence that is germane to the arguments the parties raise here. Unless otherwise indicated, the
24 parties stipulate to the following facts (*see* Pl.'s Sep. Stmt. at ¶¶ 41-42, 73-78, 80-90, Dkt. No. 14-
25 1; Def.'s Sep. Stmt. at 1, Dkt. No. 21-1):

26 A. Medical Evidence of Record

27 In 2009, Plaintiff's VA treaters interpreted his lumbar spine x-rays as suspicious for lower

1 thoracic spine disease, S1 degenerative disease, and S1 spina bifida occulta. AR 249, 371.
2 Plaintiff visited the VA pain clinic on a regular basis in 2010; that year he also underwent a
3 "bilateral lumbar radio facet thermocautery," a diagnostic posterior primary ramus block, and he
4 received a corticosteroid injection for spina bifida and low back pain. AR 262-65, 297, 319, 347.
5 In 2011, Plaintiff was prescribed a cane. AR 444-46. In 2012, Plaintiff underwent a bilateral L4-5
6 and a right L5-S1 facet medial branch block injection. AR 553-54.

7 The VA determined that Plaintiff is partially disabled as of May 2012 as the result of a
8 service-connected low-back condition (radiculopathy and thoracolumbar spondylosis) and
9 gastroesophageal reflux disease with hiatal hernia. AR 223-25.

10 Plaintiff has been treated by VA psychiatrist Christine Leyba, M.D., since September
11 2012. AR 545, 587-90. Dr. Leyba diagnosed Plaintiff with PTSD, which he sustained after seeing
12 a good friend crushed by an armed personnel carrier. AR 546-48. Dr. Leyba prescribed
13 medications to treat Plaintiff's symptoms. AR 519, 547-48.

14 Dr. Leyba opined that Plaintiff's physical pain was connected to his PTSD symptoms. She
15 wrote that Plaintiff "may be dealing with emotional pain in a somatic manner." AR 517, 548. She
16 also wrote that his physical pain exacerbated his depressive symptoms, concentration and mood
17 problems, and PTSD symptoms, including sleep problems. AR 582 ("In my professional opinion
18 it is more likely than not that Mr. Liu's service connected pain is exacerbating his mental state.")

19 In April 2013, Dr. Leyba completed a Social Security Administration ("SSA") Short Form
20 Evaluation for Mental Disorders for Plaintiff. AR 587-90. She reported Plaintiff had "poor"
21 ability in several areas of mental functioning, including (1) understanding, remembering and
22 carrying out complex instructions; (2) maintaining concentration, attention and persistence; (3)
23 completing a normal workday and workweek without interruptions from psychologically based
24 symptoms; and (4) responding appropriately to changes in a work setting. AR 590. The SSA
25 Short Form defines "poor" as when "evidence supports the conclusion that the individual cannot
26 usefully perform or sustain the activity." AR 590.

27 Also in April 2013, Dr. Leyba referred Plaintiff to Dr. Kristi Steh to undergo a full
28

1 neuropsychological evaluation. AR 1026-36. Dr. Steh found Plaintiff's attention and
2 concentration ranged from average to impaired, with improved performance as the tasks became
3 more difficult. AR 1029-31. Dr. Steh found Plaintiff's overall cognitive profile was variable,
4 with many of his performances falling below expectation, and noted that Plaintiff's performance
5 appeared to improve as the evaluation progressed and he became more relaxed. AR 1031-32. Dr.
6 Steh did not set forth specific functional limitations but recommended that Plaintiff learn new
7 information in small chunks, allow ample time to learn new material, and break down complex
8 tasks. AR 1034.

9 In November 2013, Dr. Leyba completed an SSA Medical Source Statement Concerning
10 the Nature and Severity of an Individual's Mental Impairment ("MSS"). AR 651-55. Dr. Leyba
11 opined that Plaintiff had a "substantial loss" of ability to respond appropriately to supervision, co-
12 workers and usual work situations, and a "substantial loss" of ability to deal with changes in a
13 routine work setting. AR 654. She opined Plaintiff had "moderately severe" limitations in nine
14 categories: the ability (1) to understand and remember detailed instructions; (2) maintain
15 attention and concentration for extended periods; (3) work in coordination with or proximity to
16 others without being unduly distracted by them; (4) complete a normal workday and workweek;
17 (5) interact appropriately with the general public; (6) accept instructions and respond appropriately
18 to criticism from supervisors; (7) get along with co-workers or peers without unduly distracting
19 them or exhibiting behavioral extremes; (8) maintain socially appropriate behavior and adhere to
20 basic standards of neatness and cleanliness; and (9) respond appropriately to changes in the work
21 setting. AR 652-53. The MSS defines "moderately severe" limitations as limitations that
22 "seriously interfere[] with the individual's ability to perform the designated activity, and
23 preclude[] the ability to perform the designated activity on a regular and sustained basis, *i.e.*, 8
24 hours a day, 5 days a week, or an equivalent work schedule." AR 651.

25 In April 2014, Dr. Leyba wrote a letter indicating that "[b]ecause of his pain" Plaintiff is
26 "unable to stand or sit for long periods of time. He has not worked for some time because of this.
27 He has tried retraining for a different profession but his disabilities make it impossible for him to

1 obtain and keep gainful employment. He should be considered unemployable.” AR 960.

2 In November 2014, Plaintiff presented to Dr. Steh for a second neuropsychological
3 evaluation. AR 1106-09. Plaintiff reported significant cognitive difficulties. *Id.* Dr. Steh and
4 Plaintiff “mutually decided to end the evaluation” after Plaintiff indicated he did not feel he would
5 be able to engage in the neuropsychological assessment. AR 1109.

6 In March 2015, Dr. Leyba wrote in a letter that Plaintiff’s “depression is clearly related to
7 his pain for which he is service connected. He has issues with sleep, mood, and concentration
8 from depression. When his pain is worse, his depressive symptoms definitely become worse. In
9 my professional opinion, it is more likely than not that his depression is directly related to his
10 service connected pain issues.” AR 955.

11 In April 2015, Dr. Leyba wrote in a letter that Plaintiff “is followed in our clinic for back
12 problems and depression. Both can impact his ability to manage school work, and he requires
13 accommodation as a disabled student.” AR 959. Dr. Leyba opined that Plaintiff needed
14 additional time to take tests, needed to receive presentation materials ahead of time, needed to sit
15 or stand at his discretion, and that it would be helpful for him to use voice recognition software so
16 he did not need to type, as typing was painful for him. *Id.* She opined Plaintiff “cannot take more
17 than 1 class during a term because of concentration issues.” AR 959.

18 **B. Plaintiff’s Testimony**

19 At the December 11, 2013 hearing, Plaintiff testified he was a medical specialist in the
20 U.S. military from 1991 until September 2007, and a chemical specialist from that point until
21 2011. AR 29. In 1992, he saw his friend killed when an armed personnel carrier rolled over; he
22 attributes his PTSD to this incident. AR 37. Plaintiff fell off a military truck in 2007, injuring his
23 back. AR 31. He injured his back a second time in 2010 when he fell from the top bunk. AR 31.
24 He was on active duty until 1997, in the reserves from 1997 to 2007, and once more on active duty
25 from 2007 to 2011. AR 42. While in the reserves, Plaintiff was called up once a month and two
26 weekends a year. AR 44-45. He also helped with his family’s restaurant business. AR 45-46. He
27 otherwise did not work. AR 44-46.

1 In 2013, Plaintiff testified he stopped working because his contract with the Army had
2 ended. AR 29; *see also* AR 43 (Plaintiff's attorney noted Plaintiff's separation was due to a
3 reduction in force). In 2015, Plaintiff testified he stopped working because he failed to meet the
4 Army's body and weight standards, he was unable to participate in the physical training, and
5 because of military downsizing. AR 773, 793. He did not look for other work after leaving the
6 Army in February 2011 because he planned to go back to school. AR 773-74.

7 Plaintiff attended college between 2012 and 2015. AR 35-36. In 2013, he attended classes
8 four days per week in two two-hour segments (7:30-9:30 and 10:00-12:00). AR 55. He did his
9 homework in the afternoons. AR 56. He took a leave of absence in 2013 for twelve weeks. AR
10 35, 774-75. He quit school permanently after the spring semester of 2015 because he could not
11 keep up in class due to his memory problems. AR 774-77. He estimates he missed school more
12 than five days a month because of anxiety, depression, and pain. AR 790.

13 At both the December 2011 and the September 3, 2015 hearings, Plaintiff testified he
14 began seeing Dr. Leyba once a month starting in 2012 for his depression. AR 39-40, 48-49, 783.
15 She prescribed Ambien for sleep, Xanax for mood control, and Adderall for concentration. AR
16 47-48.

17 At the September 2015 hearing, Plaintiff testified his pain was "mind numbing" and his
18 low back hurt "24/7". AR 31-32, 781-82. He could only sit for 15-20 minutes before his pain
19 became so bad he could not stand it anymore. AR 793. In 2011, Plaintiff began seeing Dr. Myo
20 Chang at the VA; Dr. Chang prescribed Percocet and Oxycontin for his back pain, and
21 recommended physical therapy and chiropractic treatment. AR 32-33; *see also* AR 784 (Dr.
22 Leyba prescribed medication, which helped).

23 Since 2011, Plaintiff has used a cane prescribed by the VA the majority of the time, even
24 inside his house. AR 781. He would not leave the house without his cane. AR 794. With his
25 cane, he can walk a quarter to a half-mile. AR 794. He can stand for half an hour or so. *Id.*

26 He testified that he has memory problems and that he regularly has whole days he cannot
27 recall. AR 777. Plaintiff only gets up and dressed three times a week; he stays in bed watching

1 television most of the day if he does not have appointments. AR 786-87. He does no housework,
2 and he has a driver because he no longer drives. AR 779, 786-87, 792, 794-95.

3 **C. The ALJ's Findings**

4 The regulations promulgated by the Commissioner of Social Security provide for a five-
5 step sequential analysis to determine whether a Social Security claimant is disabled.¹ 20 C.F.R.
6 § 404.1520. The sequential inquiry is terminated when “a question is answered affirmatively or
7 negatively in such a way that a decision can be made that a claimant is or is not disabled.” *Pitzer*
8 *v. Sullivan*, 908 F.2d 502, 504 (9th Cir. 1990). During the first four steps of this sequential
9 inquiry, the claimant bears the burden of proof to demonstrate disability. *Valentine v. Comm'r*
10 *Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). At step five, the burden shifts to the
11 Commissioner “to show that the claimant can do other kinds of work.” *Id.* (quoting *Embrey v.*
12 *Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)).

13 At the first step, the ALJ must initially determine whether the claimant is performing
14 “substantial gainful activity,” which would mandate that the claimant be found not disabled
15 regardless of medical condition, age, education, and work experience. 20 C.F.R. §
16 404.1520(a)(4)(i), (b). Here, the ALJ determined that Plaintiff had not performed substantial
17 gainful activity between February 8, 2011 and June 30, 2015 (the date Plaintiff was last insured).
18 AR 693.

19 At step two, the ALJ must determine, based on medical findings, whether the claimant has
20 a “severe” impairment or combination of impairments as defined by the Social Security Act. 20
21 C.F.R. § 404.1520(a)(4)(ii). If no severe impairment is found, the claimant is not disabled. *Id.*
22 § 404.1520(c). Here, the ALJ determined that Plaintiff had the following severe impairments:
23 posttraumatic stress disorder (“PTSD”), lumbar spine degenerative disc disease, personality
24 disorder, obesity, attention deficit hyperactivity disorder (“ADHD”), and depression. AR 693.

25 _____
26 ¹ “Disability” is the “inability to engage in any substantial gainful activity” because of a medical
27 impairment which can result in death or “which has lasted or can be expected to last for a
continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A).

If the ALJ determines that the claimant has a severe impairment, the process proceeds to the third step, where the ALJ must determine whether the claimant has an impairment or combination of impairments that meet or equal a “listed impairment.” *See* 20 C.F.R. § 404.1520(a)(4)(iii); *id.* § 404.1520(d). If a claimant’s impairment either meets the listed criteria for the diagnosis or is medically equivalent to the criteria of the diagnosis, he is conclusively presumed to be disabled, without considering age, education and work experience. *Id.* § 404.1520(d). Here, the ALJ determined that Plaintiff did not have an impairment or combination of impairments that meets the listings. AR 694. Specifically, the ALJ found Plaintiff did not meet Listings 1.04 (Disorders of the Spine), 12.04 (Affective Disorders), and 12.06 (Anxiety-related Disorders). *Id.* The ALJ also considered the effects of Plaintiff’s obesity. *Id.* The ALJ concluded Plaintiff did not meet Listing 1.04 because later imaging showed normal lumbar spine x-ray. AR 694. With respect to the Listings for mental impairments, the ALJ found Plaintiff did not have at least two “marked” limitations in the relevant criteria. AR 694.

Before proceeding to step four, the ALJ must determine the claimant’s Residual Function Capacity (“RFC”). 20 C.F.R. § 404.1520(e). RFC refers to the most an individual can do in a work setting, despite mental or physical limitations caused by impairments or related symptoms. *Id.* § 404.1545(a)(1). In assessing an individual’s RFC, the ALJ must consider all of the claimant’s medically determinable impairments, including the medically determinable impairments that are non-severe. *Id.* § 404.1545(e). Here, the ALJ determined that Plaintiff has the RFC to perform light work, with the following exceptions: he could lift and/or carry 20 pounds occasionally and 10 pounds frequently; could sit for six out of eight hours; could stand and/or walk for two out of eight hours; needed a cane to walk long distances or on uneven terrain; could occasionally climb, balance, stoop, kneel, crouch, and crawl; was limited to simple repetitive tasks with occasional contact with the public; and required additional supervision when learning new tasks and twice an hour for 10 minutes at a time during one hour of training. AR 695-96.

The fourth step of the evaluation process requires that the ALJ determine whether the

1 claimant's RFC is sufficient to perform past relevant work. 20 C.F.R. §§ 404.1520(a)(4)(iv);
2 404.1520(f). Past relevant work is work performed within the past 15 years that was substantial
3 gainful activity, and that lasted long enough for the claimant to learn to do it. *Id.* §
4 404.1560(b)(1). If the claimant has the RFC to do his past relevant work, the claimant is not
5 disabled. *Id.* § 404.1520(a)(4)(iv). Here, the ALJ determined Plaintiff could not perform any past
6 relevant work. AR 705.

7 In the fifth step of the analysis, the burden shifts to the Commissioner to prove there are
8 other jobs existing in significant numbers in the national economy which the claimant can perform
9 consistent with the claimant's RFC, age, education, and work experience. *See* 20 C.F.R.
10 §§ 404.1520(g); 404.1560(c). The Commissioner can meet this burden by relying on the
11 testimony of a vocational expert or by reference to the Medical-Vocational Guidelines. *See*
12 *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006). If the Commissioner meets this
13 burden, the claimant is not disabled and is not entitled to benefits. *Id.* If the Commissioner cannot
14 meet this burden, the claimant is entitled to benefits. *Id.* Here, based on the testimony of the
15 vocational expert, Plaintiff's age, education, work experience, and RFC, the ALJ determined
16 Plaintiff could perform jobs that exist in significant numbers in the national economy. AR 705-06
17 (Plaintiff could perform the requirements of occupations such as bench assembler, mail clerk, and
18 merchandise marker).

19 **D. ALJ's Decision and Plaintiff's Appeal**

20 On December 29, 2015, the ALJ again issued an unfavorable decision finding that Plaintiff
21 was not disabled. AR 688-707. Pursuant to 20 C.F.R. § 404.984(d), this decision became the
22 final decision of the agency upon remand. Having exhausted all administrative remedies, Plaintiff
23 commenced this action for judicial review pursuant to 42 U.S.C. § 405(g). *See* Compl., Dkt. No.
24 1. On August 2, 2016, Plaintiff filed the present Motion for Summary Judgment. On November
25 7, 2016, Defendant filed a Cross-Motion for Summary Judgment.

26 Plaintiff argues the ALJ applied incorrect legal standards to find that the opinions of Dr.
27 Leyba, his treating physician, were not entitled to controlling weight. Pl.'s Mot. at 4-14. As a

1 result, Plaintiff argues, the ALJ erred in finding his impairments did not meet or equal a listed
2 impairment, and erred in finding he could perform a limited range of light work. *Id.* at 2-3.
3 Plaintiff also argues the ALJ improperly rejected the opinion of “examining physician” Dr.
4 Brandon. *Id.* at 15. He further argues the ALJ improperly rejected the credibility of his
5 allegations. *Id.* at 15-23. Finally, Plaintiff argues the ALJ failed to resolve conflicts between the
6 VE’s testimony and the Dictionary of Occupational Titles (“DOT”). *Id.* at 23-25. Defendant
7 argues the ALJ did not err, and the Commissioner’s decision should be upheld. *See* Def.’s Mot.

LEGAL STANDARD

This Court has jurisdiction to review final decisions of the Commissioner pursuant to 42 U.S.C. § 405(g). The ALJ’s decision must be affirmed if the findings are “supported by substantial evidence and if the [ALJ] applied the correct legal standards.” *Holohan v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (citation omitted). “Substantial evidence means more than a scintilla but less than a preponderance” of evidence that “a reasonable person might accept as adequate to support a conclusion.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (quoting *Flaten v. Sec’y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995)). The court must consider the administrative record as a whole, weighing the evidence that both supports and detracts from the ALJ’s conclusion. *McAllister v. Sullivan*, 888 F.2d 599, 602 (9th Cir. 1989). However, “where the evidence is susceptible to more than one rational interpretation,” the court must uphold the ALJ’s decision. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). Determinations of credibility, resolution of conflicts in medical testimony, and all other ambiguities are to be resolved by the ALJ. *Id.*

22 Additionally, the harmless error rule applies where substantial evidence otherwise supports
23 the ALJ’s decision. *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990). A court may not
24 reverse an ALJ’s decision on account of an error that is harmless. *Molina v. Astrue*, 674 F.3d
25 1104, 1111 (9th Cir. 2012) (citing *Stout v. Comm’r, SSA*, 454 F.3d 1050, 1055-56 (9th Cir. 2006)).
26 “[T]he burden of showing that an error is harmful normally falls upon the party attacking the
27 agency’s determination.” *Id.* (quoting *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)).

1

DISCUSSION2 **A. Dr. Leyba**3 1. SSA Standards for Weighing Opinion of Treating Physician

4 Physicians opining about a social security claimant's condition "may render medical,
 5 clinical opinions, or they may render opinions on the ultimate issue of disability—the claimant's
 6 ability to perform work." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citation omitted).
 7 "Generally, the opinions of examining physicians are afforded more weight than those of non-
 8 examining physicians, and the opinions of examining non-treating physicians are afforded less
 9 weight than those of treating physicians." *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007) (citing
 10 20 C.F.R. § 404.1527(d)(1)-(2)); *see also* 20 C.F.R. § 404.1527(d).

11 If a treating physician's medical opinion is well-supported and not inconsistent with other
 12 substantial evidence in the record, the ALJ must give the treater's opinion "controlling weight."
 13 20 C.F.R. § 404.1527(c)(2); Soc. Sec. Rul. ("SSR") 96-2p. "Not inconsistent" means no other
 14 substantial evidence contradicts or conflicts with the treater's opinion. SSR 96-2p. But it is error
 15 to give a treater's opinion controlling weight simply because it is from a treating physician, if the
 16 opinion is not well supported by medically acceptable diagnostic techniques, or if it is inconsistent
 17 with other medical evidence. *Id.* However, to reject the uncontradicted opinion of a treating or
 18 examining doctor, an ALJ must state "clear and convincing reasons supported by substantial
 19 evidence in the record." *Reddick*, 157 F.3d at 725 (quotation and citation omitted).

20 2. The ALJ Gave Dr. Leyba's Opinions Only Limited Weight

21 The ALJ acknowledged the record contained "many opinions from the claimant's treating
 22 doctor, Dr. Christine Leyba." AR 702-03 (describing Dr. Leyba's assessments of April 2013,
 23 November 2013, April 2014, March 2015, and April 2015).² She acknowledged a treating

25 ² The ALJ did not find that other medical sources contradicted Dr. Leyba's opinions, and the SSA
 26 did not have Plaintiff undergo a mental health examination in connection with his application for
 27 disability benefits. Dr. Leyba's opinions thus were uncontradicted. Defendant argues the two
 28 State agency physicians who opined that Plaintiff did not have a severe impairment contradict Dr.
 29 Leyba's opinions regarding Plaintiff's physical limitations and therefore support the ALJ's
 30 decision to give Dr. Leyba's opinions little weight. *See* Def.'s Mot. at 5. This argument fails.

1 physician's medical opinion is entitled to "special significance, and, when supported by objective
2 medical evidence and consistent with other substantial evidence of record, entitled to controlling
3 weight." AR 703 (citing SSR 96-2p); *cf.* AR 703-04 ("The doctor's opinions are without
4 substantial support from the other evidence of record . . . Dr. Leyba's opinion . . . is not
5 supported by the objective findings nor those of any other medical source."). The ALJ
6 nevertheless did not afford Dr. Leyba's opinions substantial or controlling weight, and instead
7 only afforded them limited weight. *See* AR 703-04. The ALJ gave limited weight to Dr. Leyba's
8 April 2014 opinion that Plaintiff cannot sit for long periods of time and needs a sit/stand option
9 (AR 960), because as a psychiatrist, Dr. Leyba had not treated Plaintiff for his physical
10 impairments, including his back pain: "[a]s such, her opinion appears to rest at least in part on an
11 assessment of impairments outside of [her] area of expertise." AR 703. The ALJ also gave
12 limited weight to Dr. Leyba's multiple assessments of Plaintiff's mental health limitations because
13 her opinions were not supported by objective medical evidence, including her own treatment notes
14 that showed "many normal mental status examinations" and indicated that Plaintiff's symptoms
15 and functioning improved with treatment. AR 703. The ALJ concluded Dr. Leyba's opinions
16 were "without substantial support from the other evidence of record, which obviously renders
17 them less persuasive." AR. 703; *see also id.* at 704 ("Dr. Leyba's opinion regarding the
18 claimant's mental limitations has not been provided substantial or controlling weight because it is
19 not supported by the objective findings nor those of any other medical source."). Finally, the ALJ
20 gave limited weight to Dr. Leyba's April 2015 letter noting Plaintiff needed accommodation at
21 school because "this letter is addressed to his issues at school and does not pertain to social
22 security and related to social security disability requirements." AR 703. Although the ALJ
23 accounted for Plaintiff's PTSD and irritability by limiting him to occasional public contact and for
24 his ADHD and concentration issues by limiting him to simple, repetitive work with additional
25

26 The ALJ herself gave "little weight" to these evaluators' opinions because neither examined
27 Plaintiff nor reviewed the most recent evidence of record. AR 704. This Court is constrained to
review the reasons asserted by the ALJ, and cannot accept Defendant's invitation to engage in post
hoc rationalization. *See Burrell v. Colvin*, 775 F.3d 1133, 1141 (9th Cir. 2014).

supervision in learning new tasks, the ALJ found the record did not support any of the other limitations assessed by Dr. Leyba. AR 704.

Plaintiff argues the Commissioner applied incorrect legal standards to find Dr. Leyba's opinions as a treating physician were not entitled to controlling weight. Pl.'s Mot. at 4-14. Had Dr. Leyba's opinions regarding his mental and physical limitations been given the appropriate weight, Plaintiff contends the ALJ would have determined he met or equaled a Listing at Step Three of the sequential evaluation. *Id.* at 2-3.

3. Analysis

The ALJ erred in discounting Dr. Leyba’s opinions about Plaintiff’s mental health limitations because they are “without substantial support from the other evidence of record.” AR 703. In so doing, the ALJ applied the incorrect standard. A treater’s opinion does not need “substantial support” from the other evidence of record; it only needs to be “well supported” by “medically acceptable clinical and laboratory diagnostic techniques.” SSR 96-2p. An opinion is “well supported” if there is “some reasonable support” for it. *Id.* There is “some reasonable support” for Dr. Leyba’s opinions, notably her longitudinal observations and treatment of Plaintiff since 2012, as well as her review of Plaintiff’s other treatment records (including Dr. Steh’s neuropsychological evaluations (AR 1026-36, 1105-11), the VA’s treatment of Plaintiff’s physical ailments since 2010, and the VA’s 2012 determination that Plaintiff had a service-connected disabling low-back condition (AR 223-25)). Her opinions are further supported by the multiple medications she and Dr. Chang prescribed for Plaintiff’s mood, concentration, sleep, and pain.

To the extent the ALJ concluded Dr. Leyba’s treatment notes did not support her opinion, she also erred. First, the ALJ erred in relying entirely on her own interpretation of Dr. Leyba’s notes describing the mental status examinations. *But see* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(3) (“We must exercise great care in reaching conclusions about your ability or inability to complete tasks under the stresses of employment during a normal workday or work week based on a time-limited mental status examination or psychological testing by a clinician . . .”). If the

1 ALJ felt the voluminous record did not support Dr. Leyba's uncontradicted opinions, which Dr.
2 Leyba offered after treating Plaintiff for several years, the ALJ had a duty to fully develop the
3 record and, at a minimum, ask Dr. Leyba to provide greater information regarding the basis for her
4 opinions. *See Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996) (the "ALJ has a special duty
5 to fully and fairly develop the record and to assure that the claimant's interests are considered
6 If the ALJ thought he needed to know the basis of [a doctor's] opinions in order to evaluate them,
7 he had a duty to conduct an appropriate inquiry, for example by subpoenaing the physicians or
8 submitting further questions to them." (citing *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir.
9 1983)). The ALJ also could have subpoenaed Dr. Leyba or ordered additional testing. Second,
10 the ALJ's summary of Dr. Leyba's mental status exams acknowledges that in the majority of the
11 exams, Dr. Leyba noted complaints about concentration, anxiety, irritability, and sleep problems;
12 many times noted Plaintiff had suicidal thoughts; and once noted Plaintiff experienced a
13 dissociative episode. AR 697-98.³ Although the mental status exams show that Plaintiff felt
14 better on some days than others, on the whole, these support Dr. Leyba's opinion that Plaintiff had
15 "marked" difficulties with memory and concentration. *See Garrison v. Colvin*, 759 F.3d 995,
16 1017 (9th Cir. 2014) ("[I]t is error to reject a claimant's testimony merely because symptoms [of
17 mental health issues] wax and wane in the course of treatment. Cycles of improvement and
18 debilitating symptoms are a common occurrence, and in such circumstances it is error for an ALJ
19 to pick out a few isolated instances of improvement over a period of months or years and to treat
20 them as a basis for concluding a claimant is capable of working."); *see also Holohan v.*
21 *Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001) (because a person suffering from mental health
22 impairments improves does not mean the person's impairments no longer affect ability to work).
23 Dr. Steh's evaluation also supports Dr. Leyba's opinions, and suggests Plaintiff's performance is
24 affected by his comfort level, which may be different in a work setting than a doctor's office. Dr.

25 _____
26 ³ The Court does not adopt Defendant's description of these as "reveal[ing] many generally
27 normal mental status examinations." Def.'s Mot. at 3; *id.* at 6 (referencing "many normal mental
status examinations but for an irritable mood and some concentration problems" but failing to
acknowledge exams repeatedly mentioned suicidal thoughts).

1 Leyba's opinions were "well supported" and the ALJ failed to give sufficient weight to the
2 subjective aspects of Dr. Leyba's opinions. *See Embrey*, 849 F.2d at 421-22 ("To say that medical
3 opinions are not supported by sufficient objective findings or are contrary to the preponderant
4 conclusions mandated by the objective findings does not achieve the level of specificity our prior
5 cases have required, even when the objective factors are listed seriatim.").

6 The ALJ also erred in discounting Dr. Leyba's opinion regarding Plaintiff's pain-related
7 limitations. The ALJ discounted that opinion because Dr. Leyba did not provide treatment for
8 Plaintiff's back pain. On the contrary, Dr. Leyba repeatedly opined that Plaintiff's back pain was
9 connected to his mental condition in multiple ways: the pain exacerbated his mental state, his
10 mood disorder affected his pain perception, and he may be dealing with his emotional pain in a
11 somatic manner. The record reflects that Dr. Leyba considered Plaintiff's pain to be an integral
12 part of his mental health condition, and thus her treatment of Plaintiff included evaluating and
13 attempting to address his pain to the extent it was a somatic expression and/or his mood disorder
14 affected his perception of the pain. The fact the State agency physicians opined Plaintiff had no
15 severe physical impairments therefore does not contradict Dr. Leyba's opinion that Plaintiff's
16 mental state was contributing to his pain.

17 The ALJ's reasons for rejecting the opinion Dr. Leyba articulated in her April 2015 letter
18 are also not clear and convincing. The ALJ discounted Dr. Leyba's opinion that Plaintiff needed
19 accommodations when attending school four hours a day, four days per week on the sole basis it
20 addressed issues at school rather than Plaintiff's functional abilities as related to his SSA
21 application for disability. Dr. Leyba, based on her treatment and understanding of Plaintiff's
22 condition, opined that Plaintiff could not perform adequately in a school setting on a part-time
23 basis absent certain accommodations. In fact, even with accommodations, Plaintiff took a leave of
24 absence from school and eventually stopped pursuing his degree because he did not feel able to
25 keep up with his schoolwork. Such limitations might, logically, apply to Plaintiff's ability to
26 perform adequately in a work setting on a full-time basis and thus be relevant to the SSA
27 evaluation of disability.

1 To the extent Dr. Leyba opined Plaintiff was “unemployable” (AR 703 (citing April 2014
2 letter)), however, the ALJ did not err in rejecting her opinion. The ultimate issue of disability is
3 reserved to the Commissioner. 20 C.F.R. § 404.1527(d)(1) (“We are responsible for making the
4 determination or decision about whether you meet the statutory definition of disability. . . . A
5 statement that you are ‘disabled’ or ‘unable to work’ does not mean that we will determine that
6 you are disabled.”).

7 In sum, the reasons the ALJ articulated for rejecting Dr. Leyba’s opinions were not “clear
8 and convincing.” Plaintiff asks the Court to make a finding of presumptive disability rather than
9 remand the action. Pl.’s Mot. at 14. The Court finds this case would benefit from further
10 administrative proceedings to give the ALJ the opportunity to develop the record by obtaining
11 additional information from Dr. Leyba or Dr. Steh, or requiring Plaintiff to undergo a mental
12 health examination with an SSA consultant. As such, the Court declines to apply the credit as true
13 doctrine. *See Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1105 (9th Cir. 2014).

14 **B. Dr. Brandon**

15 In July 2014, Dr. Elizabeth Brandon, D.O., reviewed Plaintiff’s back examination and
16 complete Veterans Benefits Management System claim file and treatment records. AR 1111. The
17 VA specifically asked Dr. Brandon to review the information and “comment on the functional
18 impairment caused solely by the veteran’s service-connected lumbar spine condition with bilateral
19 lower extremity radiculopathy.” *Id.* Dr. Brandon opined that based on Plaintiff’s back condition,

20 sedentary or semi sedentary work would be expected to be
21 unrestricted. He demonstrates on exam severe limitation of back
22 [range of motion] and has subjective complaints of radiculopathy.
23 He continues to have a normal strength testing exam, normal
24 reflexes, normal xray and no MRI imaging studies of the lumbar
25 spine that would indicate the lumbar spine as being the primary
26 source of the pathology limiting his functional status. Therefore,
27 based on known objective findings and studies, there is no pathology
28 identified beyond subjective complaints, the severity of which are
inconsistent with known pathology of the area, that would restrict
the Veteran’s functional status in sedentary or semi sedentary
occupations.

AR 1111-12. The ALJ did not address Dr. Brandon’s opinion in her decision. Plaintiff argues this

1 failure to address or give any reasons for rejecting Dr. Brandon's opinion is reversible error. Pl.'s
2 Mot. at 15.

3 Plaintiff argues that Dr. Brandon limits him to sedentary or semi sedentary work. *Id.* But
4 Dr. Brandon merely opines that "sedentary or semi sedentary work would be expected to be
5 unrestricted" – Dr. Brandon does not opine that Plaintiff could not perform light jobs with
6 restrictions. AR 1111; *see also id.* at 1111-12 ("[T]here is no pathology identified beyond
7 subjective complaints, the severity of which are inconsistent with the known pathology of the area,
8 that would restrict [claimant's] functional status in sedentary or semi sedentary occupations."). As
9 stated, Dr. Brandon's opinion does not support greater limitations than those assessed by the ALJ.
10 The ALJ's failure to address Dr. Brandon's opinion is harmless error.

11 C. Plaintiff's Credibility

12 The ALJ found Plaintiff's testimony regarding the intensity, persistence, and limiting
13 effects of his symptoms was not "entirely credible." AR 700. The ALJ did not make any findings
14 of malingering, and therefore could reject Plaintiff's subjective complaints only by making
15 specific credibility findings. *See SSR 96-7p* (credibility findings "must be sufficiently specific to
16 make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to
17 the individual's statements and the reasons for that weight."); *see also Thomas*, 278 F.3d at 958
18 (credibility finding must be properly supported by record and sufficiently specific to ensure
19 reviewing court that ALJ did not "arbitrarily discredit" claimant's subjective testimony).

20 The ALJ made a number of specific credibility findings. First, the ALJ discounted
21 Plaintiff's credibility because the daily activities Plaintiff described "are not limited to the extent
22 that one would expect, given the complaints of disabling symptoms and limitations." AR 700.
23 For example, the ALJ focused on Plaintiff's report that he had limited difficulty attending to his
24 personal care needs, can make simple meals, goes outside daily, drives a car, handles money and
25 pays bills, and attends school. *Id.* While an ALJ should not penalize a claimant for striving to
26 perform necessary activities of daily living (*see, e.g., Long v. Colvin*, 2015 WL 971198, at *8
27 (N.D. Cal. Mar. 3, 2015 (citing Ninth Circuit cases)), the ALJ focused on the fact Plaintiff

1 attended school for several years, out of his home and in the presence of others, as a reason for
2 discrediting Plaintiff's testimony that he could not leave the house and that being around others
3 was difficult. The physical and mental abilities, and social interactions, required to perform the
4 activities Plaintiff admitted to participating in, the ALJ opined, "are the same as those necessary
5 for obtaining and maintaining employment." AR 700. Similarly, the ALJ also cited the fact that
6 Plaintiff's PTSD did not interfere with his work while in the Army, and that the VA did not base
7 his disability rating on his mental condition. AR 701. These are specific credibility findings that
8 are supported by the record.

9 Second, the ALJ discounted Plaintiff's credibility because evidence indicated he stopped
10 working for reasons unrelated to his disability: he was discharged from the military after he was
11 unable to pass a physical and because the military was downsizing. AR 700. Plaintiff also
12 testified he did not look for other work not because he was disabled, but because he planned to
13 attend school, which he did for a time despite concentration problems. AR 700. The ALJ
14 weighed Plaintiff's conflicting testimony and discredited Plaintiff's argument he stopped working
15 because of his claimed disability. This is a rational interpretation of the evidence. *See*
16 *Magallanes*, 881 F.2d at 750.

17 Third, the ALJ discounted Plaintiff's credibility because there was no objective diagnostic
18 explanation for the level of pain he claimed to be experiencing, and because he responded well to
19 treatment. *See* AR 700 (the record showed "normal lumbar x-ray and no medical explanation for
20 his pain, with chiropractic treatment helping his symptoms"; Plaintiff was treated conservatively
21 with medication management and therapy and treatment was "generally successful in controlling"
22 his symptoms). "In evaluating the credibility of pain testimony after a claimant produces
23 objective medical evidence of an underlying impairment, an ALJ may not reject a claimant's
24 subjective complaints based solely on a lack of medical evidence to fully corroborate the alleged
25 severity of pain." *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). The ALJ nevertheless is
26 permitted to consider the lack of evidence as one factor in the overall credibility determination. *Id.*
27 at 681. Here, the ALJ only used the lack of evidence as one factor, and thus did not err. The
28

1 responsiveness to treatment also is an acceptable ground for discounting Plaintiff's credibility.
2 See *Crane v. Shalala*, 76 F.3d 251, 254 (9th Cir. 1996) (evidence claimant responded well to
3 treatment proper basis for rejecting testimony to contrary).

4 While Plaintiff may disagree with the ALJ's weighing of the evidence and the undersigned
5 may have reached a different conclusion, this is not a basis for reversing the ALJ's decision. See
6 *Magallanes*, 881 F.2d at 750 (where evidence is susceptible to more than one rational
7 interpretation, court must uphold the ALJ's decision).

8 **D. Resolving Conflict with Dictionary of Occupational Titles**

9 Because the Court orders remand based on the ALJ's failure to properly weigh Dr. Leyba's
10 opinions, it does not reach Plaintiff's final argument that the ALJ failed to resolve a conflict with
11 the Dictionary of Occupational Titles. See Pl.'s Mot. at 23.

12 **CONCLUSION**

13 The ALJ erred by failing to give clear and convincing reasons for rejecting Dr. Leyba's
14 opinions regarding Plaintiff's limitations. The Court accordingly **GRANTS IN PART** Plaintiff's
15 Motion for Summary Judgment and **GRANTS IN PART** Defendant's Cross-Motion for Summary
16 Judgment. The case is remanded for further proceedings. On remand, the ALJ shall obtain
17 additional information from Dr. Leyba and/or Dr. Steh, and may require Plaintiff to undergo a
18 mental health evaluation.

19 The Court will enter a separate judgment pursuant to Federal Rule of Civil Procedure 58.

20 **IT IS SO ORDERED.**

22 Dated: January 26, 2017

23 
24 MARIA-ELENA JAMES
United States Magistrate Judge